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Labor Smart, Inc. and Third-Party Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

Labor Smart, Inc,
Plaintiff,

v.

Jason Tucker et al.,
Defendants.

Case No. 2:22-cv-00357-PHX-JJT

MOTION TO DISQUALIFY
ATTORNEYS' VERONICA L.
MANOLIO AND SPENCER
FREEMAN AS ATTORNEYS FOR
PARTIES JASON AND MELISSA
TUCKER¹

Plaintiff/Counterdefendant Labor Smart, Inc., and Third-Party Defendants Takeover Industries, Inc., Joseph Pavlik, Next Gen Beverages, LLC, Michael Holley and Chirine Holley, Thomas Zarro and Kimberly Zarro and Toby McBride, through their counsel, pursuant to Rule 42, Arizona Rules of Professional Conduct, and ER 1.7 and ER 1.9, move to disqualify attorneys Veronica Manolio and Spencer Freeman from their representation of the Tuckers in this case, due to a clear conflict of interest. The conflict only became apparent on September 27, 2024, when Ms. Manolio, on behalf of the Tuckers, filed her First Amended

¹ On December 12, 2024, attorney Scott Rhodes, at the request of Paul M. Levine, sent a letter to Ms. Manolio setting forth in detail why Mr. Rhodes believes Ms. Manolio and Mr. Freeman should withdraw from representing the Tuckers in this matter. Mr. Rhodes invited a responsive letter if Ms. Manolio believed that anything stated in his letter was factually or legally wrong. Ms. Manolio never responded. A copy of Mr. Rhodes letter is attached as **Exhibit "A"**.

1 Third-Party Claims against Third-Party Defendants Takeover and Joseph Pavlik (her former
2 clients), and others. (Doc. 179.)

3 This Motion is supported by the attached Memorandum of Points and Authorities, the
4 December 12, 2024 opinion letter from attorney Scott Rhodes (**Exhibit "A"**), and the entire
5 record in this case.²

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Prior Status of Parties and Their Attorneys Through September 26, 2024.**

8 Attorney Veronica Manolio filed the original Complaint in this case on March 8, 2022
9 on behalf of the Plaintiff Takeover Industries, Inc. ("Takeover"). Approximately three (3)
10 months later, Ms. Manolio was also representing Mr. Pavlik and the Tuckers. On June 14,
11 2022, the Tuckers, Takeover and Mr. Pavlik all signed a Memorandum Concerning Joint
12 Defense and/or Conflict of Interest ("Memorandum"), a copy of which is attached as **Exhibit**
13 **"B"**. Ms. Manolio continued her representation of Takeover and Mr. Pavlik through
14 December 6, 2022, when this court entered its Order granting Ms. Manolio's Motion to
15 Withdraw as counsel for Takeover and Mr. Pavlik. (Doc. 102.)

17 **II. Current Status of the Tuckers and Their Attorneys.**

18 On September 27, 2024, Ms. Manolio, as attorney for the Tuckers, filed the Tuckers'
19 First Amended Counterclaims and Third Party Claims against Takeover, Pavlik (both former
20 clients), Holley, McBride, Zarro and Next Gen Beverages. (Doc. 179).

23 ² Mr. Rhodes specializes in providing advice on ethical and professional responsibility matters
24 related to professional conduct of attorneys. See Mr. Rhodes Overview, attached to **Exhibit**
"A".

1 A careful review of the allegations in the Third-Party Complaint against Mr. Pavlik
2 further confirms Ms. Manolio's conflicts as a result of her current representation of the
3 Tuckers and the claims against Mr. Pavlik, her former client. Many (if not all) of the facts
4 alleged in support of the Third Party Claims against Mr. Pavlik occurred either before or
5 during the time when Ms. Manolio represented Mr. Pavlik, i.e., June through December
6 2022.³

7 Ms. Manolio alleges:

8 (i) in 2021, Mr. Pavlik was working with Holley and McBride and "offered Tucker an
9 ownership/shareholder interest in Takeover." (Paragraph 21.)⁴

10 (ii) in June 2021, Holley, McBride and Pavlik held a Special Meeting of the Takeover
11 Directors, which appointed Tucker as a Takeover Director and its President. (Paragraph 22.)

12 (iii) in August 2021, Pavlik, Holley, McBride and Tucker "put together a 'Takeover –
13 LTNC Agreement' [the July 2021 Agreement] to memorialize the discussions and agreements
14 they made during the June 2021 Board Meeting." (Paragraph 27.)

15 (iv) in September 2021, Tucker and Pavlik entered into a written "Preferred Stock
16 Purchase Agreement." (Paragraph 31.)

17 (v) in September 2022, Pavlik, Holley and McBride "committed wrongdoing by over-
18 pledging the shares of Takeover." (Paragraph 58.)

22 ³ In paragraph 12, the Tuckers allege "Pavlik appeared and consented to personal
23 jurisdiction." As discussed above, Mr. Pavlik's appearance in this case was when he was
24 represented by Ms. Manolio.

⁴ All paragraph references are to Doc. 179.

1 (vi) Pavlik, Holley and McBride "colluded... to stage a 'takeover' of Takeover."
2 (Paragraph 61.)

3 (vii) in November 2022, Pavlik, Holley and McBride "continued collusive efforts with
4 third-party Thomas ("Tom") Zarro to reorganize Takeover and LTNC." (Paragraph 69.)

5 (viii) Pavlik, Holley, McBride and Zarro "colluded to 'strip' Takeover of all of its
6 rights/assets/liabilities, disregarding this ongoing lawsuit in the Nevada Lawsuit and start a
7 new/competing entity, Next Gen, to carry on the identical business that Takeover conducted."
8 (Paragraph 74.)

9
10 Ms. Manolio's Third-Party Claims against Pavlik, Holley and McBride alleged a: (I)
11 breached fiduciary duties owed to Tucker (Third Party Claim I); (II) aided and abetted
12 Takeover and LSI to commit various tortious acts (Third Party Claim II); (III) breached the
13 July 2021 Agreement (Third Party Claim III); (IV) breached the covenant of good faith and
14 fair dealing with respect to the July 2021 Agreement (Third Party Claim IV); and (V)
15 conspired to commit fraudulent transfer (Third Party Claim V). Virtually all of the facts to
16 support these claims occurred either before or during Ms. Manolio's representation of Mr.
17 Pavlik.

18 On December 10, 2024, Ms. Manolio filed an Application for Substitution of Counsel,
19 with Client Consent (Doc. 190), because "counsel for Takeover has raised an issue of conflict
20 by Ms. Manolio continuing representation when she previously represented Takeover." Ms.
21 Manolio requested that the court substitute attorney Spencer Freeman as counsel for the
22 Tuckers' Third-Party Claims against Takeover only. Ms. Manolio said she "will continue to
23 act as lead counsel for the Tuckers." That is, Ms. Manolio continues to represent the Tuckers:
24

1 (i) defending the LSI Amended Claims, (ii) prosecuting the Tuckers' Counterclaim against
2 LSI, and (iii) prosecuting all of the Third-Party Claims against Pavlik (her former client),
3 Holley, McBride, Zarro and Next Gen Beverages (Doc. 179). Mr. Freeman represents the
4 Tuckers only in connection with the Tuckers' Third-Party Claim against Takeover. (Doc.
5 191).

6 **III. The Arizona Rules of Professional Conduct Apply to**
7 **Motions to Disqualify.**

8 This Court has adopted the Arizona Rules of Professional Conduct as its ethical
9 standards. This court applies the Arizona ethical rules when evaluating motions to disqualify.
10 *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. and Power District*, 810 F. Supp. 2d 929
11 (D. Ariz. 2011).

12 **IV. Arizona's Ethical Rules Require the Disqualification of**
13 **Ms. Manolio and Mr. Freeman As Counsel for the**
14 **Tuckers.**

15 As is clear from the record, there is no dispute that Ms. Manolio jointly represented
16 the Tuckers, Takeover and Mr. Pavlik from at least June 14, 2022 (the date the Memorandum
17 was signed), through December 6, 2022, when the Order (Doc. 102) permitting withdrawal
18 was signed, a period of almost 6 months.

19 On September 27, 2024, Ms. Manolio, on behalf of the Tuckers, sued Takeover and
20 Mr. Pavlik (her former clients), and others. Even though Ms. Manolio is no longer
21 representing the Tuckers against Takeover, she still represents the Tuckers against Mr. Pavlik,
22 her former client. Even if Ms. Manolio were to seek to substitute Mr. Freeman or some other
23 counsel in connection with the Tuckers' claim against Mr. Pavlik, that would not be sufficient
24

1 to avoid disqualification. ER 1.9 requires Ms. Manolio's complete withdrawal from this case.⁵

2 Quoting from Mr. Rhodes December 12, 2024 letter, he states:

3 Even if you did not have a duty to withdraw entirely from the case in
4 November 2022 (which I believe you had), such a duty became patently
5 obvious when you filed your First Amended Counterclaims and Third-Party
6 Claims on September 27, 2024. Following termination of a representation, a
7 lawyer retains her duties of loyalty and confidentiality to the former client
8 absent client consent, which has not been given. (*See* ER 1.7, cmt. [9].)
9 Under ER 1.9, a lawyer cannot undertake the representation of a client in
10 "the same or substantially related matter" for which the lawyer previously
11 represented another client with adverse interests, absent the former client's
12 informed consent. Here, you have continued to represent the Tuckers in *the*
13 *same litigation* for which you later sued Takeover and Pavlik. You neither
14 requested nor received a waiver from Takeover or Pavlik to be sued by you
15 on behalf of the Tuckers.⁶

16 ⁵ **ER 1.9: "Duties to Former Clients"** states:

17 **(a)** A lawyer who has formerly represented a client in a matter shall not thereafter represent
18 another person in the same or a substantially related matter in which that person's interests
19 are materially adverse to the interests of the former client unless the former client gives
20 informed consent confirmed in writing.

21 **Comment 1** states: "After termination of a client-lawyer relationship, a lawyer has certain
22 continuing duties with respect to confidentiality and conflicts of interest and thus may not
23 represent another client except in conformity with this Rule.... Nor could a lawyer who has
24 represented multiple clients in a matter represent one of the clients against the others in the
same or a substantially related matter after a dispute arose among the clients, unless all
affected clients give informed consent."

25 ⁶ **ER 1.7: "Conflicts of Interest" (Current and Former Clients)** states:

26 **(a)** Except as provided in paragraph (b) a lawyer shall not represent a client if the
27 representation involves a concurrent conflict of interest.⁶ A concurrent conflict of
28 interest exists if:

29 **(1)** the representation of one client will be directly adverse to another client; or

30 **(2)** there is a significant risk that the representation of one or more clients will be
31 materially limited by the lawyer's responsibilities to another client, a former client
32 or a third person or by a personal interest of the lawyer.

1 The substitution of Mr. Freeman to prosecute the Tuckers' claims against Takeover
2 does not cure the conflict. Mr. Rhodes states:

3 I am aware you have recently provided notice that another lawyer will
4 represent the Tuckers for the counterclaims and third-party claims.⁷ That,
5 however, neither forgives nor cures your violations of your duties of
6 confidentiality and loyalty. In addition to prohibiting conflicts of interest with
7 former clients absent waivers, ER 1.9 also prohibits a lawyer from revealing
8 or using a former client's confidential information against the former
9 client's interests. (ER 1.9(c).) This prohibition cannot be avoided by
retaining separate counsel, because your knowledge of confidential
information of Takeover and Pavlik exists and cannot be excised from your
brain. "Humans cannot partition their brains so that they only use particular
knowledge for particular purposes." *Hyde Park Venture Partners Funds III*,

10 **Comment 4 states:**

11 **If a conflict arises after representation has been undertaken, the lawyer ordinarily must**
12 **withdraw from the representation, unless the lawyer has obtained the informed consent**
13 **of the client under the conditions of paragraph (b). See ER 1.16. Where more than one**
14 **client is involved, whether the lawyer may continue to represent any of the clients is**
15 **determined both by the lawyer's ability to comply with duties owed to the former client**
16 **and by the lawyer's ability to represent adequately the remaining client or clients, given**
17 **the lawyer's duties to the former client.**

18 **Comment 27 states:**

19 **In considering whether to represent multiple clients in the same matter, a lawyer should**
20 **be mindful that if the common representation fails because the potentially adverse**
21 **interests cannot be reconciled, the result can be additional cost, embarrassment and**
22 **recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all**
23 **of the clients if the common representation fails. In some situations, the risk of failure is**
24 **so great that multiple representation is plainly impossible. For example, a lawyer cannot**
undertake common representation of clients where contentious litigation or negotiations
between them are imminent or contemplated. Moreover, because the lawyer is required
to be impartial between commonly represented clients, representation of multiple clients
is improper when it is unlikely that impartiality can be maintained. Generally, if the
relationship between the parties has already assumed antagonism, the possibility that
the clients' interests can be adequately served by common representation is not very
good.

7 As discussed above, Mr. Freeman represents the Tuckers only as to the Third Party claims
against Takeover.

1 *L.P. v. FairXchange, LLC*, 292 A. 3d 178, 196 (Del. Ch. 2022).

2 In *Bicus v. Superior Court in and for Pima County*, 116 Ariz. 69, 567 P. 2d 1198 (App.
3 1977), the issue was whether the trial court abused its discretion when it denied a motion to
4 exclude attorneys from further representation. The Court of Appeals held that the trial court
5 abused its discretion and ordered that the attorneys be disqualified. The court stated:

6 The principle which bars an attorney from representing an interest adverse to
7 that of a former client is most often said to be grounded upon the confidential
8 relationship which exists between attorney and client, the courts taking the
9 view that by imposing this disability upon the attorney, confidential
information conveyed by the former client is protected from possible
disclosure and wrongful use.

10 . . .
11 Where it can reasonably be said that in the course of former representation
12 an attorney might have acquired information related to the subject matter of
his subsequent representation, the attorney should be disqualified.

13 *Id.*, pp. 1201, 1203.

14 There is no requirement that client confidences be divulged before disqualification is
15 required.

16 [Rule 1.9(a)] does not require that confidences and secrets be divulged in
17 order for a conflict to exist or for disqualification to be proper. [Citations
18 omitted.] Regardless of what was communicated during the representation of
19 the former client, the rule prohibits subsequent representation of an
individual whose interests are substantially adverse to those of the former
client.

20 *Foulke v. Knuck*, 162 Ariz. 517, 784 P. 2d 723, 728 (App. 1989). Nevertheless, Ms. Manolio's
21 use of confidential information is apparent. Mr. Rhodes states:

22 That you have confidential information of both Takeover and Pavlik
23 is undeniable. For the approximately eight months in which you represented
24 Takeover, and the approximately five months in which you jointly

1 represented Pavlik and the Tuckers, you became privy to in-depth
2 knowledge, not only about Takeover and its business, but about Pavlik and
3 the other persons with interests in Takeover. Review of your billing invoice
4 of November 16, 2002, reveals that, between June and November 2002, you
5 conferred with both Tucker and Pavlik about issues related to McBride,
6 whom you later sued on behalf of the Tuckers. Your knowledge of
7 confidential information during this time period extended beyond Tucker
8 and Pavlik to the entire Board of Directors. On September 21, 2002, for
9 example, you recorded time for reviewing "all communications back and
10 forth among BOD re: accounting of Toby [McBride]'s personal charges,
11 each person's version of what occurred, and necessity of protecting
12 Takeover." Your duty of confidentiality to Takeover encompasses
13 information about its Board members, investors, and other interested parties.

14 You also engaged in email communications with Pavlik while you
15 represented him, including emails in November 2002 which, given the
16 context of other activities at the time, undoubtedly concerned Takeover's
17 strategy related to your TRO petition, in which you sought the appointment
18 of a Receiver for Takeover. This timing is of particular concern, because on
19 November 8 and 11, 2002, you also recorded time for preparing a motion to
20 withdraw from your representation of Pavlik, which you filed on November
21 11. You thus were conferring with Pavlik in preparation for the TRO while
22 simultaneously preparing to withdraw from representing him. You revealed
23 information about this series of confidential communications with Pavlik to
24 his detriment in your November 22, 2002 Motion to Withdraw from your
representation of Takeover, which I have quoted and discussed above.

V. Ms. Manolio's Fee Agreement Mandates Her Disqualification.

17 On or about March 1, 2002, Ms. Manolio's law firm, Manolio & Firestone, entered
18 into a Professional Services Agreement ("Agreement") with Takeover.⁸ The Agreement was
19 signed by Mr. Tucker in his capacity as Takeover's President. The Agreement states Ms.
20 Manolio represents Takeover in connection with disputes with Mr. Holley and Mr. Eisenberg
21
22
23

24 ⁸ A copy of the Agreement is attached as **Exhibit "C"**.

1 and possibly others that are “adverse to Takeover Industries, Inc., LaborSmart, Inc., and/or
2 Jason Tucker and/or his marital community.”

3 The Agreement identifies what Ms. Manolio believes are her ethical obligations with
4 respect to the use of confidential information. The Agreement states, in pertinent part, as
5 follows:

6 WE DO NOT DISCLOSE ANY PERSONAL INFORMATION ABOUT
7 OUR CLIENTS OR FORMER CLIENTS TO ANYONE, EXCEPT AS
8 PERMITTED OR REQUIRED BY LAW AND ANY APPLICABLE
9 STATE ETHICS RULES. We do not disclose any nonpublic personal
10 information about current or former except to effectuate the purpose of our
representation or as required or permitted by law or applicable provisions of
codes of professional responsibility or ethical rules governing our conduct as
lawyers.

11 (See **Exhibit "C"**, General Terms and Disclosures.)

12 Then, on June 14, 2022, Takeover, the Tuckers and Mr. Pavlik signed the
13 Memorandum. The Memorandum states, in pertinent part, as follows:

14 **[W]e cannot represent the client if the representation of that client**
15 **would be directly adverse to another client**, without your consent after
16 discussing the same.

17 **[I]nformation or knowledge obtained by an attorney from a client and,**
18 **in turn, client relationships, shall be kept confidential and shall not be**
19 **used to the disadvantage of that client while representing another.** This
always poses a potential problem if it is learned in the course of this lawsuit
that one of you has essentially done something that is damaging to the case
and/or to the other defendants.

20 However, by signing below, the company, Jason and Melissa Tucker and
21 Joseph Pavlik specifically agree that Takeover Industries, Inc shall pay for
22 the joint representation with no individual fees borne to either the Tucker
community or Pavlik. This compromise shall be considered sufficient
23 consideration to the Tucker community and/or Pavlik such that each of those
individuals [the Tuckers and Mr. Pavlik] hereby expressly agrees that
24 **Takeover Industries, Inc. may continue to use the services of the firm**

1 **Manolio & Firestone, PLC should a conflict of interest arise among in**
2 **the joint representation.** Jason and Melissa Tucker each expressly agrees
3 that he/she will not object to continued representation of the company by
4 this law firm even if the individual(s) are made to hire independent counsel
5 at some future date.... **[T]he firm does not intend to waive the clients'**
6 **rights and does not intend to use information to better any party's**
7 **position by information obtained under the attorney/client privilege.**
8 Should any such unresolvable conflict arise, the firm would make proper
9 disclosure and seek resolution with all defendants. (Emphasis in original.)

10 **V. Conclusion.**

11 Respectfully, Ms. Manolio has a clear conflict of interest which prohibits her continued
12 representation of the Tuckers in any capacity in this case. Likewise, because of potential
13 improper disclosures made by Ms. Manolio to Mr. Freeman, he should also be ordered to
14 withdraw. Mr. Rhodes concludes:

15 The record is therefore remarkably clear that, when adversity arose
16 among some of your jointly represented clients, you not only failed to
17 withdraw immediately from representing all of the clients, you picked your
18 preferred clients (the Tuckers), then nearly two years later, you switched
19 sides and sued Takeover and Pavlik without requesting or obtaining either
20 their consent to sue them or their consent that you may reveal or use their
21 confidential information to their detriment.

22 I again ask you to give careful consideration to the contents of this
23 letter. In my opinion, based on my experience and knowledge of the ethical
24 obligations of Arizona lawyers, (1) you must immediately move to
25 withdraw from representing the Tuckers or any other party in the pending
26 lawsuit, and (2) because you could not have informed Spencer Freeman
27 about the case without imparting to information of Takeover and/or
28 Pavlik, Mr. Freeman must withdraw as well.

29 ///

30 ///

31 ///

1 **RESPECTFULLY SUBMITTED** this 21st day of January, 2025.

2 **PAUL M. LEVINE, P.C.**

3
4 By /s/ Paul M. Levine

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8 **ELECTRONICALLY FILED**

this 21st day of January, 2025.

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